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IN THE

Supreme Court of the United States

October Term, 1966

No. 573

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

JAY R. TIMMONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 29, 1966. A petition for rehearing was denied by that Court on June 20, 1966.

OPINIONS BELOW

The initial opinion affirming the judgment of conviction was rendered by the Supreme Court of Appeals of Virginia.

Timmons v. *Commonwealth,* 204 Va. 205, 129 S.E. 2d 697.

The petitioner's application for relief in the State court was denied after a plenary hearing on July 30, 1963. A writ of error to that judgment was denied by the Supreme Court of Appeals on October 17, 1963. Certiorari was denied by this Court on January 20, 1964. *Timmons* v. *Cunningham,* 375 U.S. 994.

On April 28, 1965, an order and memorandum opinion were filed denying the relief requested in the United States District Court for the Eastern District of Virginia, Norfolk Division. *Timmons* v. *Peyton,* 240 F. Supp. 749.

The court below rendered its opinion on April 29, 1966. *Timmons* v. *Peyton,* 360 F. 2d 327. A petition for rehearing en banc was filed, and the same was denied on June 20, 1966.

THE JUDGMENT

On June 23, 1966, an order was entered in the United States Court of Appeals for the Fourth Circuit, staying the issuance and transmission of a certified copy of the judgment of that Court in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in the case involved is grounded upon 28 U.S.C., §1254 (1).

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit Err in Holding that the Action of the State in Committing Timmons for Observation As to His Mental Condition Prior to Trial Was a Violation of His Constitutional Rights and Did the Court Err Further in Holding That Timmons Is a Man "Who Is in Law Insane."

STATUTES INVOLVED

Section 19.1-227, Code of Virginia
Section 19.1-228, Code of Virginia
28 U.S.C., Section 1254(1)

STATEMENT OF THE CASE

The facts in this case are set forth most adequately by Mr. Justice Spratley in *Timmons* v. *Commonwealth*, 204 Va. 205, 129 S.E. 2d 697, in his opinion, which will be found in the Appendix. Moreover, Judge J. Sydney Smith, Jr., in his opinion, which will be found in the Appendix, at the State habeas corpus proceeding, delineated the facts in the habeas corpus proceeding.

Likewise, Honorable Walter E. Hoffman, United States District Judge, in *Timmons* v. *Peyton*, 240 F. Supp. 749, adequately explained the same.

The foregoing opinions will be found in the Appendix to this brief.

Briefly, the facts are as follows: On October 19, 1961, Jay R. Timmons murdered Ann Bannon at her home in Norfolk, Virginia, and shot and raped her friend, Ruth Lewis. He was taken into custody by the police, and he began shortly to show the effect of sleeping pills, which he had taken earlier. He was taken to the local hospital, where his stomach was pumped, and he was admitted for the night.

The next afternoon, he was released into the custody of the police and taken to police headquarters and questioned for approximately forty minutes. He then gave a statement admitting the crime.

On October 24, 1961, the City Sergeant served upon Timmons, who was then again confined in the hospital, a petition for a commitment order. The following day the order was entered, and he was committed to Southwestern

State Hospital for observation as to his mental condition. He was not present at the hearing, nor was he represented by counsel.

On December 20, 1961, he was returned to Norfolk to stand trial. He waived preliminary hearing, and was indicted for murder. On February 1, 1962, counsel was appointed to represent him. A trial was had on April 17, and 18, 1962.

At the trial, the Commonwealth's evidence was uncontradicted and showed that Timmons had committed the homicide. Timmons' only defense was that he was insane at the time the crime was committed.

The jury found Timmons guilty of murder in the first degree and fixed his punishment at death.

Thereafter, the various appeals followed.

ARGUMENT

The Superintendent will demonstrate on the following pages that the court below has ignored established principles of law in reaching its decision in the premises. Moreover, in an appeal from a habeas corpus proceeding, it has held that the petitioner is a man "who is in law insane" and then directs the State to afford him a new trial. The court below has, therefore, exceeded the jurisdiction conferred upon it in the premises, and for that reason its decision should be reversed.

I.

The Court Erred In Holding That the Prisoner Is Insane at Law And That the Procedures Employed Prior to His Trial Violated His Constitutional Rights.

On October 24, 1961, some five days after Timmons' arrest, the Commonwealth's Attorney for the City of Nor-

folk filed a motion asking that he be committed to Southwestern State Hospital for observation as to his mental condition. A copy of this motion was served upon Timmons, who was then a patient at Norfolk General Hospital. The next day, on October 25, 1961, a hearing was held before the Judge of the Corporation Court of the City of Norfolk. After hearing evidence, the Judge ordered Timmons committed to Southwestern State Hospital. The order required the Superintendent to take proper care of Timmons and to report on his mental condition as of the date of the crime and all day subsequent thereto. The order was entered pursuant to the provisions of §§19.1-227 and 19.1-228 of the Code of Virginia, which are set forth below:

> § 19.1-227. "No person shall, while he is insane, be tried for a criminal offense; nor shall any person charged with a felony be committed to any hospital or other institution for the mentally ill except by order of the court of record, or judge thereof, which has, or would have upon certification and indictment, jurisdiction of the trial of the case."
>
> § 19.1-228. "If, prior to the time for trial of any person charged with crime, either the court or attorney for the Commonwealth has reason to believe that such person is in such mental condition that his confinement in a hospital for the insane or a colony for the feeble-minded is necessary for proper care and observation, the court or the judge thereof may, after hearing evidence on the subject, commit such person, if a white person, to any State hospital for the insane best adapted to meet the needs of the case and, if a colored person, to the Central State Hospital, under such limitations as it may order, pending the determination of his mental condition. In any such case the court, in its discretion, may appoint one or more physicians skilled in the diagnosis of insanity, or other qualified physicians, and when any person is alleged to be

> feeble-minded may likewise appoint persons skilled in the diagnosis of feeble-mindedness, not to exceed three, to examine the defendant before such commitment is ordered, make such investigation of the case as they may deem necessary and report to the court the condition of the defendant at the time of their examination. A copy of the complaint or indictment, attested by the clerk, together with the report of the examining commission, including, as far as possible, a personal history, according to the form prescribed by the general board of directors of the State hospitals, shall be delivered with such person to the superintendent of the hospital to which he shall have been committed under the provisions of this section. As used in this section the term 'court' shall be construed to include courts not of record and courts of record."

The court below held that Timmons was denied due process of law by reason of the fact that he was not represented by counsel at this point and by further reason of the fact that he was not represented by counsel until February of 1962.

Here, it is clear that it would have been somewhat impractical to bring Timmons to Court, for the reason that he was confined in the hospital. This commitment was for his protection, as was pointed out in the case of *Thomas* v. *Cunningham,* 313 F. 2d 934. In its decision the court below complains of the action of the officials of the Commonwealth, including the Commonwealth's Attorney and the learned Trial Judge, in committing this man to a mental hospital for observation while he was not represented by counsel. It is obvious that the Judge of the Corporation Court of the City of Norfolk acted with due dispatch upon the petition of the Attorney for the Commonwealth to protect the interests of the defendant. It is admitted that counsel was not appointed at this time to represent this prisoner. It

is of tremendous significance, however, that Timmons and his family chose to rely upon court-appointed counsel to handle his defense until the verdict of the jury was returned. With that in hand, much haste was made to employ counsel, to seek an appeal, to seek a writ of habeas corpus, and to seek relief from the Governor of Virginia. These attorneys are employed by the family of the prisoner. If they can afford to employ counsel now, it is obvious that they could have afforded to employ counsel then.

It would seem obvious, therefore, that it was impractical to bring Timmons to Court at the time the petition was heard.

The Court's attention is directed to footnote 3 in the opinion of the court below, where it is suggested that the prisoner's testimony should be believed that he made constant requests for counsel. The learned Judge sitting as Judge of the Corporation Court of the City of Norfolk in the habeas corpus proceeding had the opportunity to see this man and to hear his testimony and to hear the testimony of the other witnesses. It is quite clear that Judge Smith determined that the prisoner was lying in everything that he said in connection with his request for counsel. This is a clear subterfuge to try to muddy the waters of a very clear stream of evidence showing this man's guilt and showing further that he had a fair trial.

There is no indication in the record that Timmons was prevented from securing counsel or securing aid from his family while he was confined at Southwestern State Hospital at Marion. It has long been recognized that prisoners while confined in that institution have liberal access to the courts and to the outside. *Miller* v. *Blalock,* 356 F. 2d 273.

The court below, relying upon *Powell* v. *Alabama,* 287 U.S. 45, and *White* v. *Maryland,* 373 U.S. 59, holds that the prisoner's Sixth Amendment right to counsel during a

critical pre-trial proceeding was denied him and that consequently his trial was adversely affected. These two cases involved proceedings before a court, which were critical stages of the trial, in that certain of the prisoner's rights were lost to him by reason of the absence of counsel. Such is not the case before this Court in this proceeding. No rights of the prisoner were lost by reason of the fact that he was not represented by counsel at this hearing. Moreover, the Court's opinion below indicates that the prisoner was in jail, while the record indicates that he was confined at the hospital. Should he have been carried into Court on a stretcher to be exhibited before the Judge, this would have accomplished nothing. It is quite clear that, here, the Commonwealth was endeavoring to protect the rights of the accused and is now being chastised for its action.

Indeed, the United States Court of Appeals for the Fourth Circuit in *Thomas* v. *Cunningham,* 313 F. 2d 934, chastised a Virginia Judge for not committing a man for observation after testimony was given as to his mental condition. Here, the Commonwealth is put in the ridiculous position of being condemned for taking the very action that it was required to do under the Fourth Circuit's opinion in *Thomas, supra.*

It is quite clear that the judgment of the court below is incorrect when it holds that the prisoner was hindered in the preparation of his defense by reason of the absence of counsel. It is not suggested in what way counsel was hindered in the preparation of his defense. Indeed, in this particular case, this prisoner was represented by a distinguished member of the Bar of the City of Norfolk, a retired Major General in the National Guard, and a man of long experience at the Bar. He was complimented by the Supreme Court of Appeals of Virginia in its opinion for the excellent manner in which he had represented this man. He

did not indicate that he was hindered in his defense in any way by reason of the fact that he was not appointed until February of 1962. Here again, the court below ignored its own decisions in *Turner* v. *Maryland,* 318 F. 2d 852; *United States* v. *Ray,* 351 F. 2d 544; and *Horne* v. *Peyton,* 356 F. 2d 631. In the cited cases, the Court had held that a clear showing of prejudice must be made, in order for the writ to issue. It would seem obvious that the prisoner has had several opportunities to show such prejudice and has been unable to do so.

In the court below, Judge Bell said, "We think the preparation of his defense could and should have been allowed to proceed concurrently with the state's." There is no proof that the State was trying to prepare anything at this particular time. There is no evidence that the State was attempting to interfere with this prisoner's rights in any way. There was no reason why this man's defense could not be prepared. Indeed, it is quite clear that the psychiatrists studying him at the Southwestern State Hospital had no idea as to what their findings would be, and it could well have developed that they might have found him to be insane.

In addition, Judge Bell says, "Furthermore, there is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigations of the patient's background to verify or refute his own statements." In a recent serious murder case, now pending in the City of Richmond, a learned court-appointed attorney has directed his client not to talk with any psychiatrists sent by the Court to examine him as to his present or past mental condition. This statement is obviously without any basis in law or fact and is demonstrative of the necessity for the reversal of the judgment.

The court below criticizes the evidence in the case and points out that there is a glaring discrepancy between the diagnosis made by the defendant's experts and that of the Commonwealth's. It is quite clear from a review of the record that the diagnoses made were contrary. The Court said, "Certainly, a jury of laymen in search of the truth as to the petitioner's mental status is entitled to more than the naked confrontation of two such diverse diagnoses." It is manifest that this suggestion by the court below is almost incredible. In almost every lawsuit there is a complete divergence of opinion as to what happened in a particular situation. The best example is a determination of whether or not the plaintiff had the green light or whether the defendant had the green light. These are every day occurrences. Here, in the State habeas corpus proceeding, the prisoner testified to one thing in regard to his request for counsel, and the police officers and others testified to the contrary. It is for the Judge or the jury to make a determination as to which party to believe. In the case at bar, it is clear that the jury, having had an opportunity to see the witnesses and hear their testimony, determined that the prisoner was not insane.

It is repeatedly suggested in the opinion of the court below that the defendant was denied his right of preparation of his defense, while the State was actively seeking evidence to convict. In the first place, the State needed to seek little evidence to convict this man, for the simple reason that there was an eyewitness present, who saw him commit the crime. He was committed to Marion for observation for his own benefit. It was not until the prisoner interposed the defense of insanity that the State subpoenaed its own physicians.

Indicative of the tenor of the opinion below is the following language: "Given the sickening and appalling nature

of the facts of Timmons' crime, his mental history, his low mentality, and the strong testimony of a psychiatrist that he was insane, there is little doubt that a jury would have found that a reasonable doubt existed as to his sanity." Here, we have the court below making a determination as to what a jury would do under specific circumstances. This is indeed incredible for a court to speculate as to what a jury might do in any given case. The court criticized the Virginia rule which requires that the burden of proof rests upon the defendant who pleads insanity. *Christian* v. *Commonwealth,* 220 Va. 311, 117 S.E. 2d 72; and *Jones* v. *Commonwealth,* 202 Va. 236, 117 S.E. 2d 67.

In this connection, the court below said, "We recognize the fact that the Supreme Court in 1952 in the case of *Leland* v. *Oregon,* 343 U.S. 790, has upheld an Oregon rule requiring the defendant to prove insanity beyond a reasonable doubt. We feel bound by this decision, *although we seriously doubt if it would be upheld by the present court.*" (Emphasis added.) Here, the court below has ignored this Court's holding in *Leland* v. *Oregon,* 343 U.S. 790. This case, decided in 1952, upheld the validity of the Oregon statute requiring the defendant to prove his insanity beyond a reasonable doubt. In Virginia it is merely the burden on the prisoner to prove his insanity. *Stare decisis* would indicate that this opinion is still valid despite the passage of some fourteen years. Here again, we see another reason why the judgment of the court below should be reversed.

The court below in effect held that the prisoner's rights were violated because he was examined by order of Court. This argument has been presented before and rejected. *Caster* v. *United States,* 319 F: 2d 850, 852.

The straw, however, which breaks the camel's back in the opinion of the court below is contained in this brief

statement: "When the state has marshalled all its forces against such creatures as the petitioner and has convicted a man *who is in law insane* by denying him a fair opportunity to carry his very heavy burden of proof, he has been denied 'due process' under the Fourteenth Amendment." The Court then gives the opportunity to the State to retry this individual. There is no doubt but that this was a horrible crime, and there is no doubt that this man has had a history of some mental difficulty. These questions, however, were resolved by the jury's verdict, and there is no reason to believe at this time that any additional evidence could be presented to show this man's mental condition at the time the crime was committed. Moreover, would not a defense attorney appointed by the Court or employed by the prisoner's family be in a most delightful position at the time of the retrial in this case. He would need only to walk into the courtroom of the Corporation Court of the City of Norfolk, hold up the opinion of the United States Court of Appeals for the Fourth Circuit in the premises, read the above-quoted language to the Judge, and say, "You can't try this man. He is insane at law. This is a matter which has been adjudicated."

We realize that this case involves the life of the prisoner, and his rights must be protected at every stage of the proceeding. There is no showing, however, that his rights have been violated. The opinion of the court below merely substitutes its judgment for that of the jury who tried Timmons; of the Judge who presided over that trial; of the Supreme Court of Appeals of Virginia at the time of the direct appeal of the criminal conviction; of Judge Smith, who heard the habeas corpus proceeding; again the judgment of the Supreme Court of Appeals of Virginia in the State habeas corpus proceeding; the weight of many to be attributed the denial of certiorari by this Court to that judg-

ment; and the judgment of Judge Hoffman, United States District Judge in Norfolk. It is submitted that the court below has merely reevaluated the evidence and adjusted the same to support its opinion in the premises to the derogation of the previous opinions.

CONCLUSION

The Superintendent has demonstrated conclusively that the opinion of the court below ignores numerous established principles of law. It has chastised Virginia officials for acting to protect the rights of the accused as suggested in *Thomas* v. *Cunningham, supra.* It has held in effect that this Court's decision in *Leland* v. *Oregon, supra,* is no longer the law. It has held that Jay R. Timmons is "insane at law," therefore substituting its judgment for that of the jury. The United States Court of Appeals for the Fourth Circuit has, therefore, in effect ignored the evidence contained in the record, and consequently its opinion is without any basis, not only in fact, but in law.

It is for these reasons that we pray that this Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fourth Circuit in the premises.

Respectfully submitted,

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PROOF OF SERVICE

I, Reno S. Harp, III, one of the attorneys for the petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this the 19th day of September, 1966, I served copies of the foregoing Petition for a Writ of Certiorari on the respondent herein, Jay R. Timmons, by mailing the same in a duly addressed envelope, with first class postage prepaid, to his attorney, Daniel Hartnett, Esquire, Attorney at Law, Court Green, Accomac, Virginia.

.....

RENO S. HARP, III
Assistant Attorney General

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APPENDIX I

204 Va. 205

JAY R. TIMMONS
v.
COMMONWEALTH OF VIRGINIA

Supreme Court of Appeals of Virginia

March 4, 1963

Rehearing Denied April 19, 1963

Prosecution for murder. The Corporation Court of the City of Norfolk, Part Two, Linwood B. Tabb, J., entered a judgment of conviction and a writ of error was granted. The Supreme Court of Appeals, Spratley, J., held that the admission of photograph of deceased victim's body and testimony of victim, who was wounded at time of killing, as to defendant's act of rape upon her within a few minutes of killing of other victim were not error.

Affirmed.

1. Homicide—237

Evidence sustained conviction of defendant, claiming not guilty by reason of insanity, of first degree murder.

2. Homicide—152

Where killing of victim by defendant was uncontradicted and guilty agent was not in question, defendant was presumed guilty of second degree murder, and Commonwealth had burden of proving elements necessary to establish murder in the first degree. Code 1950, § 18.1-21.

3. Criminal Law—438

Admission of photograph of body of deceased, whom defendant was charged with murdering, rested in discretion of trial court.

4. Criminal Law—371 (4, 12)

Allowing victim, who was wounded at same time deceased was killed by defendant, to testify as to defendant's acts of rape upon her within a few minutes of killing was not error in prosecution for homicide, where defendant did not except to the testimony, vigorously cross-examined wounded victim and offenses were so closely connected as to be a continuous series of acts tending to show intention and motive of defendant.

5. Criminal Law—369 (2), 371 (1, 12)

While it is not proper in criminal case to generally admit testimony of independent crime, such testimony is admissible where it shows motive, intent, or is related to or connected with or leads up to offense for which accused is on trial.

6. Homicide—308 (1)

Instructions stating that murder in commission of, or in attempt to commit, rape is murder in the first degree, and defining what constitutes crime of rape were not error in prosecution of defendant, who claimed he was not guilty by reason of insanity, for murder. Supreme Court of Appeals Rules, rule 1:8.

7. Criminal Law—1171 (1)

Remarks of attorney for Commonwealth as to probability that defendant, charged with homicide, would commit criminal acts in future if he were released, invited by arguments

of defense counsel to the effect that enormity of offense supported plea of insanity, were not so improper as to warrant reversal of conviction.

8. Criminal Law—1137 (5)

After defendant was convicted of first degree murder despite claim that he was insane at time of killing, he was precluded from successfully maintaining that admission of evidence as to sanity was erroneous and prejudicial to him.

William King Mapp, Keller (Mapp & Mapp, Keller, on brief), for plaintiff in error.

William P. Bagwell, Jr., Asst. Atty. Gen. (Robert Y. Button, Atty. Gen., on brief), for defendant in error.

Before EGGLESTON, C. J., and SPRATLEY, BUCHANAN, WHITTLE, SNEAD, I'ANSON and CARRICO, JJ.

SPRATLEY, Justice.

Jay R. Timmons was, at the February, 1962, term of the Corporation Court of the City of Norfolk, Part Two, indicted for the murder of Ann E. Bannon. The indictment was of the statutory short form, Virginia Code, § 19.1-166. He was tried on April 17 and 18, 1962, upon a plea of "not guilty by reason of insanity." The jury found him guilty of murder of the first degree and fixed his punishment at death. On June 11, 1962, motions to set aside the verdict were overruled and judgment was entered in accordance with the verdict. Counsel for the defendant duly excepted on the ground that the judgment was contrary to the law and the evidence. We granted writ of error.

The facts are in little conflict, save as to the mental condition of the defendant at the time of the homicide.

The evidence and the circumstances of this proceeding may be summarized as follows:

On October 19, 1961, Mrs. Ruth Lewis, 24 years of age, went to the home of her cousin, Mrs. Ann E. Bannon, at

221 Fife Lane, Norfolk. As she entered the house Mrs. Bannon was seated at her writing desk. Mrs. Lewis said that as she took a seat, Timmons emerged from the bath room of the house, spoke to her, and walked by her over to the front door. She turned to ask Ann what she was doing, and at this time Timmons drew a gun out of his pocket, aimed at her legs, and fired. Her legs were crossed, and the shot went through both legs. Ann screamed: "What have you done?" Timmons said: "Look you two, this was an accident." He then slammed and locked the front door. Ann said: "All right, but I will have to call an ambulance." Ann ran to the bedroom where the telephone was, and Timmons ran after her and caught hold of her. She struggled and screamed until she got away from him. She was unable to get to the telephone, so she ran out of the bedroom and tried to get out of the front door. Timmons again ran after her and grabbed her. He pulled her in front of Ruth and shot her, and "there was a series of shots" following. Three bullets hit Ann, and she fell to the floor and didn't move. One of the shots hit Mrs. Lewis in the back of her neck, the bullet lodging in the roof of her mouth. She said she could not see anything of Ann except the upper portion of her body, because she was unable to move due to her wounds; but she did hear Timmons "ripping at" Ann's clothes. After that, Timmons went back to Ruth, took her by her ankles, pulled her out of the chair on to the floor, tore her dress and undergarments, and raped her for "a couple of minutes." He then went back to Ann "for a minute or so," then returned immediately to Ruth, and raped her a second time. Afterwards he went to the kitchen and she heard water running. Next he went to the telephone, called the police department, and said to Ruth: "I had better get you to the hospital." He took her to the hospital. In the meantime, Ann Bannon had died as a result of her wounds. When the defendant telephoned, he

told someone who he was and that he had killed two women. After taking Ruth to the hospital, Timmons returned to Mrs. Bannon's home, where he was arrested by the police.

The Commonwealth introduced in evidence, over the objection of the defendant, photographs of Ann Bannon's body showing the body from different angles, and also some "slides" showing the course of the bullets through her body. The photographs were taken shortly after Mrs. Bannon was shot and before her body was moved. They show Mrs. Bannon's body lying on her back, with her dress pulled up above her waist, and her undergarments pulled down below her knees. The "slides" showed where three bullets entered the body of Mrs. Bannon and where two left. At least two entered from the back of her body. The defendant objected to the introduction of the photographs on the ground that they would inflame the jury against him; while the Commonwealth asked that they be admitted under its theory that the killing was done in the commission of, or attempt to commit rape, and show the motive of the defendant. No exception was taken as to the admission of the "slides."

Sergeant W. E. Farr, of the Norfolk Police Department, testified that he arrived at the scene of the killing about 5:30 p.m. on October 19, 1961; and that he saw the defendant the next day, at which time the defendant freely and voluntarily described the events which took place at the Bannon residence at the time of the killing. Defendant first told the officer that he drank a beer or two, bought some whiskey, and after a trip to Virginia Beach and a "little crap game," had another beer, came back to Norfolk, and didn't remember anything after that time. Being reminded that he had left out the most important facts, defendant said: "Well, I will tell you about it," and then voluntarily signed the following statement, which was written by Officer Farr: